88-1395 (1)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

THE MUNICIPAL COURT OF THE SOUTHEAST JUDICIAL DISTRICT, COUNTY OF LOS ANGELES; PORTER DE DUBOVAY; and RUSSELL L. SCHOOLING,

Petitioners,

vs.

ALVA GUTIERREZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Where, pursuant to the derivative-jurisdiction doctrine, neither the District Court nor the Court of Appeals had subject-matter jurisdiction over respondent's Title VII claim, must the judgment and opinion below, which affirmed solely on the basis of Title VII an order preliminarily enjoining enforcement of a rule requiring employees to speak in English while performing their official duties, be vacated?

2. Where, due to respondent's permanent disability retirement the controversy has become moot must the judgment and opinion below, which affirmed an order preliminarily enjoining enforcement of a rule requiring employees to speak in English while performing their official duties, be vacated?

3. Does a rule requiring employees to speak in English while performing their official duties constitute discrimination based upon national origin as applied to a person who is bilingual and fully capable of speaking English but who chooses not to do in deliberate disregard of his employer's rule? [1]

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1 Petitioners request the right to argue the following question in the event that certiorari is granted on Question No. 3:

4. Did either lower court acquire jurisdiction over respondent's Title VII claim where the individual petitioners (1) neither employed nor supervised respondent, (2) were not named as the party charged with discrimination in either the request for or the notice of a right to sue, and (3) were sued in the middle of mediation negotiations and before a right to sue letter was issued?

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were defendants-appellants Porter de Dubovay and Russell F. Schooling, who bring this petition, and defendant-appellant John W. Bunnett, on the one hand, and plaintiff-appellant Alva Gutierrez, named herein as the respondent, on the other.

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vs.

ALVA GUTIERREZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Municipal Court of the Southeast Judicial District, County of Los Angeles; Porter de Dubovay, and Russell F. Schooling, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on January 27, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 838 F.2d 1031 and is reprinted in the appendix hereto. *See* Appendix (hereafter App.) at A3. The order denying rehearing and rejecting a suggestion for rehearing en banc and the dissent from the latter ruling is reported at 861 F.2d 1187 and is reprinted in the appendix hereto. *See* App. at A51. The order of the Central District of California (Gadbois, J.) preliminarily enjoining petitioners, which is unreported, is reprinted in the appendix hereto. *See* App. at A1.

JURISDICTION

The Court of Appeals rendered its opinion and judgment on January 27, 1988 and amended its opinion on April 22, 1988. A timely petition for rehearing and suggestion for rehearing en banc was denied on November 23, 1988.

This petition has been filed within ninety days of the denial of the petition for rehearing and is therefore timely pursuant to 28 U.S.C. § 2101(c) (1982) and Sup. Ct. R. 20.4. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

REGULATION INVOLVED

English Language Rule[:] Deputy Clerks and Courtroom Attaches

(Nov. 15, 1984)

The English language shall be spoken by all court employees during regular working hours while attending to assigned duties, unless an employee is interpret-

ing for the non-English speaking public. This rule does not apply to employees while on their lunch hour or work breaks.

STATEMENT OF THE CASE

This action concerns the validity of a work rule requiring employees of the County of Los Angeles Municipal Court, Southeast Judicial District (specifically the deputy clerks and courtroom attaches) to converse in English "during regular working hours while attending to assigned duties, unless . . . interpreting for non-English speaking public". Verified Petition for Removal to United States District Court Exhibit A. "The rule does not apply to employees while on their lunch hour or work breaks." *Id.*

Respondent challenges the rule, claiming in four causes of action that it violates her federal constitutional and statutory rights. *See generally* First Amended Complaint for Damages and Injunctive Relief. Because respondent's action improperly was initiated in the California Superior Court, petitioners removed it to the United States District Court, invoking its jurisdiction pursuant to 28 U.S.C. § 1331 (1982) and 42 U.S.C. § 2000e-5(f)(3) (1982). Petitioners, the majority of the judges who sit on the Municipal Court, *see* Answer to First Amended Complaint at 2, stoutly defend the validity of the rule and deny that respondent is entitled to any relief whatsoever, *see id.* at 11.

Respondent sought and was granted a preliminary injunction prohibiting enforcement of the rule pendente lite in an uninformative order. *See* App. at A1. However, the comments of the District Court from the bench suggest that it relied upon a presumption that a rule requiring employees to speak only English in the workplace is invalid derived from an Equal Employ-

ment Opportunity Commission (EEOC) guideline, 29 C.F.R. § 1606.7 (1984),[2] interpreting the Civil Rights Act of 1964, tit. VII, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1982) (Title VII), as opposed to any evidence offered by the respondent as to the particular rule in question. *See* Reporter's Transcript of Proceedings at 9 (May 24, 1985).

A timely appeal from this order was taken to the United States Court of Appeals for the Ninth Circuit (No. 85-5931) pursuant to 28 U.S.C. § 1292(a)(1) (1982).[3] A panel of that court (Reinhardt, J., joined by Browning and Tang, JJ.) affirmed, finding that because there existed "both a likelihood of success on the merits and the possibility of irreparable injury, . . . the district court did not abuse its discretion in entering the preliminary injunction". 838 F.2d at 1036, App. at A4. The affirmance was based exclusively on Title VII; accordingly the panel expressly declined to consider whether respondent's other claims could justify issuance of the challenged order. Id. at 1037 n.5, App. at A8 n.5.

Like the District Court, the panel opinion appears to base its decision not on any facts in the record, but

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2 The current version of the regulation is found at 29 C.F.R. § 1606.7 (1988).

3 Petitioners also appealed the denial of their claims of absolute legislative and qualified executive immunity, 838 F.2d at 1037, but the resolution of these issues is not relevant to this petition. Petitioners further appealed, pursuant to 28 U.S.C. § 1292(b) (Supp. II 1984), the denial of three jurisdictional defenses to the Title VII claim, 838 F.2d at 1037, n.4; to the extent that petitioners seek review on the merits of the propriety of the preliminary injunction, these issues are fairly embraced in the questions presented to this Court.

rather upon the EEOC guideline. *See id.* at 1037-38, App. at A13-15. The panel opinion denigrated the background and purposes of the rule as justifications for business necessity of the rule. *See id.* at 1041-44, App. at A18-23.

Judge Kozinski, joined by Judges Thompson and O'Scannlain, dissented from the order rejecting a suggestion for rehearing en banc. 861 F.2d at 1188, App. at A52. Judge Kozinski concluded that the panel opinion would have the supremely ironic effect of "hamstringing employers who would assuage racial and ethnic tensions created by use of a second language in the workplace". *See id.* at 1191-94, App. at A60.

Subsequent to the denial of rehearing, respondent and the County of Los Angeles entered into a contingent or tentative agreement calling for a monetary payment to respondent and dismissal of the action against petitioners with prejudice but permitting respondent to rescind the agreement should either the Court of Appeals or this Court agree to review further or otherwise disturb the panel opinion. Petitioners opposed the requested dismissal, contending inter alia that the County's attempt to terminate this litigation while the opportunity to seek review in this Court of the panel opinion remains unlawfully interferes with the right of the petitioners to "adopt rules for the conduct of . . . the personnel of their court". Cal. Gov't Code § 72002.1 (West 1976). Nevertheless, the District Court orally dismissed the action with prejudice.[4]

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4 At the time this petition was drafted, the District Court had not entered its formal order dismissing the case, and the precise terms of the dismissal were unknown.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS LACKED SUBJECT MATTER JURISDICTION, AND ITS JUDGMENT AND OPINION THEREFORE MUST BE VACATED.

The absence of subject matter jurisdiction may be raised at any time, including upon appeal, even by the party who invoked federal jurisdiction in the first instance. *See Capron v. Van Noorden*, 6 U.S. (2 Cr.) 126, 127 (1804). "[T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception which requires this court . . . to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States . . . ." *Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379, 382 (1884).

"[J]urisdiction of the federal court on removal is . . . a derivative jurisdiction."[5] *Minnesota v. United States*, 305 U.S. 382, 389 (1939). "If the state court lacks jurisdiction of the subject-matter . . . , the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." *Lambert Run Coal Co. v. Baltimore & O.R.R.*, 258 U.S. 377, 382 (1922). Accordingly, if jurisdiction over a claim is ex-

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5 The derivative jurisdiction doctrine has been abolished prospectively by statute. 28 U.S.C. § 1441(e) (Supp. IV 1986). The jurisdictional amendment, however, applies only to claims in civil actions commenced on or after June 19, 1986 in state courts. Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3(b), 100 Stat. 663, 637 (1986). This action was commenced before that date; thus the derivative jurisdiction doctrine is fully applicable here.

clusively federal, the proper course of action for a federal district court to take after removal is "to dismiss . . . without reaching the merits". *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.27 (1983).

"[J]urisdiction over Title VII actions lies exclusively in the federal courts." *Dyer v. Grief Bros., Inc.*, 766 F.2d 398, 399 (9th Cir. 1985) (vacating judgment and ordering remand of Title VII claim); *see Valenzuela v. Kraft, Inc.*, 739 F.2d 434, 435-36 (9th Cir. 1984) (reviewing structure of statute and legislative history as basis for conclusion that jurisdiction is exclusively federal). Hence, in this removed action, which was never dismissed, the District Court had no jurisdiction over respondent's Title VII claim. Accordingly, the preliminary injunction, premised and affirmed solely upon that claim, is a nullity. The judgment and opinion of the Court of Appeals upholding the preliminary injunction and discussing the merits of respondent's Title VII claim therefore must be vacated.

II. THE JUDGMENT AND OPINION BELOW HAVE BECOME MOOT AND THEREFORE MUST BE VACATED.

The well-established practice of the federal appellate system in dealing with a case which has become moot during the appellate process or pending a decision on the merits is to vacate the judgment from which the appeal was taken and to remand the case. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). This procedure "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences". *Id.* at 41. Of necessity, therefore, the vacated judgment or opinion or both is deprived of precedential effect. *County of Los Angeles v. Davis*, 440

U.S. 625, 634 n.6 (1979) (controversy became moot during pendency of litigation).

The same principle governs cases such as this one where the issue of preliminary injunctive relief becomes moot. *See, e.g., Honig v. Students of the Cal. School for the Blind*, 471 U.S. 148, 149-50 (1985) (*per curiam*). In such cases, "the judgment of the Court of Appeals must be vacated and the case must be remanded to the District Court". *University of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981).

Here, there can be no doubt that the preliminary injunction became moot soon after it was issued. Respondent unequivocally stated that she intended to follow her doctor's instructions "never to return to work at the municipal court", Declaration of Richard A. Katzman at 12 (deposition transcript) (emphasis added). True to her word she soon thereafter filed an application for disability retirement, *see* Declaration of Joseph Sharar at 7, which was granted on April 2, 1986 (effective as of January 30, 1986).

Yet the panel opinion ignored the fact that these developments had rendered the question of the propriety of the preliminary injunction moot and only considered whether plaintiff had standing to seek it in the first place. *See* 838 F.2d at 1036 n.2, App. at A6 n.2. Clearly, therefore, the Court of Appeal decided the question of mootness in a way in conflict with the decisions of this Court from *Munsingwear* to *Honig*. In any event, the principle of those decisions requires that the panel opinion be vacated and the case remanded.

The case also may be moot because respondent has settled her claim for damages and agreed to dismiss her action against petitioners with prejudice. *See* Request for Order of Dismissal and Proposed Order of Dismissal at 1-2. Yet respondent may rescind her dismissal if

this court grants certiorari or otherwise stays, withdraws, or modifies the panel opinion. *See id.* at 2-3. "[T]his case is not moot . . . [i]n view of the tentative nature of the settlement". *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 465 n.3 (1978).

If, however, the settlement and consequent dismissal by the District Court does moot the controversy, the petition for writ of certiorari should be granted, the opinion and judgment of the Court of Appeals should be vacated, and the case should be remanded to that court with directions to dismiss the appeal. *See, e.g., J. Aron & Co. v. Mississippi Shipping Co.*, 361 U.S. 115 (1959) (*per curiam*) (procedure followed where consent judgment was entered after reversal by Court of Appeals of interlocutory decree). Even judgments and opinions of this Court are vacated when cases are mooted by settlement, *see, e.g., Stewart v. Southern Ry.*, 315 U.S. 784 (1942) (*per curiam*) (upon petition for rehearing), and a fortiori the procedure should be followed when the settlement occurs in the course of resort to this Court.

III. THE OPINION BELOW DECIDES AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT, INCONSISTENTLY WITH THE OPINIONS OF OTHER CIRCUITS AND OF ANOTHER PANEL OF THE SAME COURT.

A. Introduction.

If the panel opinion is not vacated for lack of subject matter jurisdiction or because either the question of the preliminary injunction or the case as a whole has

become moot, then the petition for certiorari should be granted and the merits reached. The panel opinion creates an undeniable inter-circuit conflict and an intra-circuit conflict with regard to an extremely important question of federal law which has not been, but should be, settled by this Court, thus presenting the special and important reasons for granting the petition specified by Sup. Ct. R. 17.1.

B. Inter-Circuit Conflict.

Because the conflict between the panel opinion and a Fifth-Circuit opinion, *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981), has been articulated lucidly by Judge Kozinski, *see* 861 F.2d at 1188-89, App. at A53-56, it is only outlined here. "*Garcia* considered an identical fact situation: The employer prohibited its bilingual sales employees from speaking Spanish while working except when addressing customers who spoke Spanish." *Id.* at 1188, App. at A53. But while *Garcia* expressly held that a "rule forbidding a bilingual employee to speak anything but English in public areas while on the job is not discrimination based on national origin as applied to a person who is fully capable of speaking English and chooses not to do so in deliberate disregard of his employer's rule", 618 F.2d at 272, the panel opinion held to the contrary, *see* 838 F.2d at 1039-40, App. at A15.

The difference in the result stems from the conflicting premises anchoring the two opinions. While the panel opinion asserts that "[t]here can be no doubt that the use of disparate impact analysis is appropriate here", 838 F.2d at 1040, App. at A15, *Garcia* holds that "there is no disparate impact if the rule is one that the affected employee can readily observe and nonobservance is a matter of choice". 618 F.2d at 270.

Thus, the panel opinion "creates a sharp and irreconcilable conflict between the two circuits that probably have the largest bilingual populations in the country".[6] 861 F.2d at 1189, App. at A56. "Yet this is precisely the type of rule that demands national uniformity, and therefore the type of case where" the exercise of this Court's discretionary jurisdiction is appropriate. *See id.*

C. Intra-Circuit Conflict.

Before the panel opinion was issued, another panel of the Ninth Circuit had decided *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987) (Wiggins, J.). *Jurado* involved a disparate impact claim brought by a bilingual disc jockey who was fired for disobeying a rule forbidding him to use occasional Spanish words and phrases on the air. *See id.* at 1408-09. The *Jurado* "panel resolved the matter by adopting the rationale of *Garcia*; there was no discrimination because the employee could easily comply with the employer's English-only rule". 861 F.2d at 1190, App. at A56.

The *Gutierrez* panel rewrote *Jurado*, *see id.* at 1190-91, App. at A57-60, "distorting, not reporting" the opinion as one that found the business-necessity test satisfied, *see id.* at 1191, App. at A60. The injustice to the parties to this action "and the many others who follow" flowing from "[t]his type of creative revisionism of prior panel opinions" requires resolution of the result-

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6 *Garcia* also is controlling by operation of stare decisis in the Eleventh Circuit, which has a very large bilingual population in the State of Florida as well. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc)(adopting prior precedents of Fifth Circuit as governing law).

ing tension just as much as does an inter-circuit conflict. *See id.*

D. An Exceptionally Important Question of Federal Law.

As Judge Kozinski observes earlier in his dissent, the panel opinion creates an irreconcilable conflict as to the validity of English-on-the-job rules in the very circuits where the question matters. *See id.* at 1189, App. at A56-60. Resolution of that conflict is all the more important because the result reached by the panel opinion "badly disserves the policies of the Civil Rights Act". *Id.* at 1191, App. at A60. "By hamstringing employers who would assuage racial and ethnic tensions created by use of a second language in the workplace, the opinion will help bring about many of the conditions the Civil Rights Act was meant to eliminate." *Id.*

The genesis of this case "illustrates the problem effectively". *Id.*

> The case arises out of racial and ethnic tensions among the employees of the Southeast Los Angeles Municipal Court, largely between blacks and Latinos. The English-only rule was not adopted by the Municipal Court judges out of xenophobia, but in response to a "complaint from a black female employee concerning the use of the Spanish language between employees in order to conceal the substance of conversation during working hours on the work floor[."] . . . The rule was also intended to assist "supervisors to understand the work conversations of their subordinates[."]

Id. (citation to record omitted).

The panel opinion prevents "employers from adopting such a rule" in a conscious attempt to alleviate racial tensions "even when they have reason to believe that language is being used to exclude and isolate employees of a particular race or ethnic group". *Id.* at

1193, App. at A66. For this reason, and because the opinion makes the ability to speak Spanish virtually a sine qua non for promotion to supervisorial positions, effectively eliminating "employees who are not bilingual, including other people of color . . . from consideration for those coveted position", *see id.* at 1194, App. at A68, thus "exacerbat[ing] racial tensions", *id.*, it guts the employer's traditional power to control conduct in the workplace just when progressive public policy most demands that it be exercised.[7] "[T]hat this result is reached in the name of a law designed to promote ethnic and racial harmony . . . is incomprehensible." *Id.*

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioners believe that the

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7 Indeed, the panel opinion guts the power of employers to impose any workplace regulation that has a disparate impact upon some ethnic or racial group, as nearly all do. *See Mopkins v. St. Louis Die Casting Corp*, 423 F.Supp. 132, 134 (E.D. Mo. 1976)("every cultural group, indeed every individual, has idiosyncracies peculiar to it."), *aff'd per curiam*, 569 F.2d 454, 455 (8th Cir. 1978)(adopting District Court opinion). Not only is the practical significance of the panel opinion thus truly enormous, but also it is clearly inconsistent with a plethora of other opinions holding that Title VII prohibits only "practices which discriminate because of 'immutable' characteristics of race, national origin, color or sex". *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 897 (9th Cir. 1974)(hair-length policy applied only to males not prohibited by Title VII); *see also e.g. Fountain v. Safeway Stores*, 555 F.2d 753, 755 (9th Cir. 1977)(requirement that men wear ties not prohibited by Title VII); *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975)(en banc)(hair-length policy upheld).

opinion and judgment below should be vacated and the matter remanded to the Court of Appeals with directions to dismiss the Title VII claim for lack of subject matter jurisdiction or, alternatively, as moot. If this course is not taken, however, Petitioners respectfully request that briefing and argument of the merits of that claim be argued.

Dated: February ___, 1989

Respectfully submitted,

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